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ON

"THE COMPETENCE OF THE CONSTITUTIONAL COURT TO CONTROL THE CONFORMITY OF LAWS WITH RATIFIED TREATIES"
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REPORT

"LEGAL FRAMEWORK AND PRACTICE OF THE CONSTITUTIONAL COURT OF SLOVENIA IN DECIDING ON CONFORMITY OF THE LAW WITH INTERNATIONAL TREATIES"

by
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COMPARATIVE PRACTICE OF CONSTITUTIONAL COURTS ON DECIDING ON CONFORMITY OF THE LAW WITH INTERNATIONAL TREATIES

RELEVANT PROVISIONS OF THE CONSTITUTION OF THE REPUBLIC OF SLOVENIA

ADOPTED AND ENTERED INTO FORCE ON 25 JUNE 1991 (OFFICIAL GAZETTE OF THE REPUBLIC OF SLOVENIA NOS. 1/91-I AND 19/91)

Article 3a [2]

Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal is passed in the referendum if a majority of those voting have cast valid votes in favour of the same. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.

Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.

In procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present.

Article 8

Laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.

Article 68[7]

(Property Rights of Aliens)
Aliens may acquire ownership rights to real estate under conditions provided by law or a treaty ratified by the National Assembly.

Article 160

(Powers of the Constitutional Court)

The Constitutional Court decides:
- on the conformity of laws with the Constitution;

- on the conformity of laws and other regulations with ratified treaties and with the general principles of international law;
- on the conformity of regulations with the Constitution and with laws;
- on the conformity of local community regulations with the Constitution and with laws;
- on the conformity of general acts issued for the exercise of public authority with the Constitution, laws, and regulations;
- on constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts;
- on jurisdictional disputes between the state and local communities and among local communities themselves;
- on jurisdictional disputes between courts and other state authorities;
- on jurisdictional disputes between the National Assembly, the President of the Republic, and the Government;
- on the unconstitutionality of the acts and activities of political parties; and
- on other matters vested in the Constitutional Court by this Constitution or laws.

In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court.

Unless otherwise provided by law, the Constitutional Court decides on a constitutional complaint only if legal remedies have been exhausted. The Constitutional Court decides whether to accept a constitutional complaint for adjudication on the basis of criteria and procedures provided by law.

Article 161

(Abrogation of a Law)

If the Constitutional Court establishes that a law is unconstitutional, it abrogates such law in whole or in part. Such abrogation takes effect immediately or within a period of time determined by the Constitutional Court. This period of time may not exceed one year. The Constitutional Court annuls ab initio or abrogates other regulations or general acts that are unconstitutional or contrary to law. Under conditions provided by law, the Constitutional Court may, up until a final decision, suspend in whole or in part the implementation of an act whose constitutionality or legality is being reviewed.

If in deciding on a constitutional complaint the Constitutional Court establishes the unconstitutionality of a regulation or general act, it may, in accordance with the provisions of the first paragraph of this article, annul ab initio or abrogate such regulation or act.

The legal consequences of Constitutional Court decisions shall be regulated by law.

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[2] As amended by the Constitutional Act Amending Chapter I and Articles 47 and 68 of the Constitution of the Republic of Slovenia, which was adopted on 27 February 2003 and entered into force on 7 March 2003 (Official Gazette of the Republic of Slovenia No. 24/03).

[7] As amended by the Constitutional Act Amending Article 68 of the Constitution of the Republic of Slovenia, which was adopted and entered into force on 14 July 1997 (Official Gazette of the Republic of Slovenia No. 42/97) and the Constitutional Act Amending Chapter I and Articles 47 and 68 of the Constitution of the Republic of Slovenia, which was adopted on 27 February 2003 and entered into force on 7 March 2003 (Official Gazette of the Republic of Slovenia No. 24/03). The original text of Article 68 read as follows: "Aliens may acquire ownership rights to real estate under conditions provided by law. Aliens may not acquire title to land except by inheritance, under the condition of reciprocity." Following the amendment of 1997, the text of Article 68 read as follows: "Aliens may acquire ownership rights to real estate under conditions provided by law or if so provided by a treaty ratified by the National Assembly, under the condition of reciprocity. Such law and treaty from the preceding paragraph shall be adopted by the National Assembly by a two-thirds majority vote of all deputies."

COMMENT

According to the Slovenian constitutional doctrine – as the jurisprudence of the Slovenian Constitutional Court as well – the hierarchy of legal acts seems well estabiliched: On top of the hierarchy are constitutional provisions, followed by the generally accepted principles of international law and trwaties that are bining on Sovenia (that is, which have been ratified by the Slovenian Parliament). The third level consists of the laws passed by the Parliament. Next (i.e., fourth) level represent international treaties ratified by the Government, folowed by the subordinated (fifth) level of national "regulations", issued by the government as authorized by the laws. That scheme derives from Articles 8 and 160 of the Constitution: Article 8 reads as follow: … and the relevant provision of Article 160 povides for the respective power of the Constitutional Court to decide on…

- Most often, the Constitutional Court refers jointly to the provisions of the treaty and the respective provisions of the Constitutions; that practice is most forthcoming in case of the ECHR, from which most human rights provisions of the Slovenian Constitution are derived (read: translated, adopted). Note that ECHR provisions were refered to as a legal authority even before their ratification by the Solvenian Parliament.
- In a few important and intriguiung cases Constitutional Court also applied the constitutional norm of "general principlers of international law", for the first time in 1994 when it decided on (un)constitutionality of the "Regulation on the military courts" as a Post-WW II revolutionary decree issued in 1945. In this, and in the following simlar cases, the CC declared that "in the Republic of Slovenia, **those provisions of the…Act shall not be applied, which had been, already at the time of creation and application of the said act, in conflict, and to the extent of their having been so, with the general legal principles recognized by civilized nations and also contrary to the Constitution.** " (Take care of the fact, that CC may only be seized to adjudicate on a valid law; however, when a past law may and should be applied for the purpose of renewal of a criminal case, CC decided that it must also declare its present application for such purpose uconstitutional.

It seems that subordination of national laws to international treaties ratified by the Parliament does not produce conceptual difficulties to the Slovenian constitutional doctrine and neither to the case law of the Slovenian CC. Intriguing issues however arise, if and when the english word "law" is understood in the general sense "the highest law of the country",t hat is, in the sense of the constitutonal norm – which is, according to the Slovenian Cionstitutional, superior both to the "second level" international treaty and to the" third level" ordinary law. From the point of view of the international community and the law of the nations – international treaty law – there is ot much difference between "constitutional" and "ordinary" laws and their respective provisions.

Here I wish to suggest from the outset an idea that seems at the first sight contrary to the Slovenian constitutional model (and is, for that matter, obviously also contrary to the established European constitutional heritage), but nevertheless prevails – to a certain degree and in certain respects - in constitutional and legislative practice in Slovenia – and also Europe wide: namely **that international treaty is in fact, under certain conditions, above any national legal provision, including those of the constitutional nature.**

In testimony to this idea may be cited and discussed, to begin with, two cases, one decided by the Slovenia Constitutional Court in June 1997, and the other one by the German Federal Constitutional Court in June 2009.

In the Slovenian case the Court adjudicated on the constitutionality of the Europe Aagreement Establishing an Association between the Republic of Slovenia, of the one part, and the

European Communities, of the other part ("European Association Treaty"). In the German case, the Court adjudated on the constitutionality of the ratification of the Lisbon Treaty among member states of the European Community and the Union.

In both cases, Courts found conflicts between constitutional and treaty norms. It was in neither case, though evident, that constitutional norm may prevail unconditionaly. A number of solutions to the conflict were either adjudicated, infered, or actually enforced, such as:

- the change of the constitutional norm to avoid conflict with the treaty norm,
- omission of ratification of the treaty,
- termination of membership in the international treaty community,
- conditional and norm-specific avoidance of application of the treaty norm in national law.

It was in no case, however, adjudicated or advised by either of the Constitutonal Courts to suppressor invalidate the treaty norm, whereby supremacy of constitutional over the treaty norm would be proved and established.

THE JUDGEMENT OF THE SLOVENIAN CONSTITUTIONAL COURT REGARDING THE CONSTITUTIONALITY OF THE EUROPE ASSOCIATION AGREEMENT (ESP)

Judgement Jne 5, 1997 – Rm-1/97 on "The Europe Agreement Establishing An Association Between The Republic Of Slovenia, Of The One Part, And The European Communities (Hereinafter: The Community) And Their Member States, Acting Within The Framework Of The European Union, Of The Other Part (Hereinafter: The ESP)"

Operative Provisions:

- Upon the request of the Government in the procedure of ratification of the Europe Agreement Establishing an Association between the Republic of Slovenia, of the one part, and the European Communities (hereinafter: the Community) and their Member States, Acting within the Framework of the European Union, of the other part (hereinafter: the ESP), the Constitutional Court herby pronounces its opinion concerning the conformity of provisions of clauses 7.b and 7.c of article 45 and Annex XIII in reference with paragraph 2 of article 64 of the ESP with the Constitution.
- The provision of clause I of Annex XIII to the ESP, according to which Slovenia shall take the measures necessary to allow the citizens of the Member States of the European Union, on a reciprocal basis, **the right to purchase real property on a non-discriminatory basis, is, in so far as the right to purchase real property refers to the purchase of land, in disagreement with the provision of the Constitution according to which foreigners may not acquire title to land** except by inheritance subject to reciprocity (paragraph 2 of article 68 of the Constitution)…
- Competent **State body may not approve any such commitment of the Republic of Slovenia under international law as would be in disagreement with the Constitution.** A commitment under international law would be in disagreement with the Constitution if, by the coming into force of an international agreement, it created directly applicable unconstitutional norms in internal law, or if it bound the State to adopt any such instrument of internal law as would be in disagreement with the Constitution…
- By passing a law on ratification of the ESP, the Republic of Slovenia would bind itself to adopt legal instruments which would guarantee the rights contained in the provisions of the ESP mentioned in items III, IV and V of this Opinion. **The most important legal instrument which the Republic of Slovenia would bind itself to adopt would be an enabling statute for amending the applicable constitutional provision according to which foreigners may not acquire title to land** (paragraph 2 of article 68 of the Constitution)…

THE JUDGEMENT OF THE GERMAN FEDERAL CONSTITUTIONAL COURT REGARDING THE CONSTITUTIONALITY OF THE LISBON TREATY

Judgement of June 30, 2009 by the Federal Constitutional Court of Germany – 2 be 2/08, 2 be 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1250/08, and 2 BvR 182/09: "The Law on ratification of the Lisbon Treaty is in conformity with the Constitution; the enabling Law is not in conformity with the Constitution as far as the parliamentary bodies are not given herewith necessary rights of participation."

By Michael Bothe (Professor of Public Law, Johann Wolfgang Goethe-Universität Frankfurt)

By its judgment of 30 June 2009, the German Federal Constitutional Court cleared the way for the German ratification of the Lisbon Treaty. The reasoning of the Court, however, contains fundamental holdings on the current legal character of the European Union and on constitutional limitations concerning its possible development.

The ratification of an international treaty by Germany must be preceded by a parliamentary consent. **In the case of the Lisbon treaty, this consent and a number of legislative acts relating to that treaty were challenged before the German Federal Constitutional Court (FCC).** The basic argument of this challenge was that the Lisbon Treaty went too far in transferring sovereign rights to the European Union, thereby jeopardizing inalienable state sovereignty, the national identity of the German State as guaranteed by the Basic Law (the German constitution) and also the constitutional principle of democracy which required, it was said, a sufficient area of public policy being reserved to parliaments elected only by the German voter.

The Court, in the result, rejected the challenges as far as the treaty itself was concerned and upheld them only to a limited extent as to the surrounding legislation, this default being easy to heal before the summer recess and the federal elections to be held in September.

That positive stance, however, was surrounded by a number of reservations and limitations which are very important for the future behaviour of the State organs of Germany towards the EU, in particular their behaviour within the organs of the EU. Thus, the Court erects some constitutional barriers against possible future expansions of European integration and Germany's participation in them. In doing so, the Court
continues to show a special kind of euroskeptical attitude which started already in the1970's and has been maintained in a number of judgments since. **While the earlier decisions of this line were concerned with the protection of (German) fundamental rights in the European Economic Community (as it then was), the more recent ones (Maastricht Treaty, now Lisbon Treaty) deal with the expansion of the powers of the European Union to the detriment of the Member States, in particular their parliaments.**

The point of departure of the Court's argument is that the European Union is a close association of sovereign States, but not a federal State. It is this type of association which the Basic Law allows and even requires Germany to join. A closer union could not be formed by relying on procedures provided by the Basic Law, even by constitutional amendment. It would require a different act of (European) constitution-
making. The power of constitutional amendment is limited by certain principles (democracy, guarantee of human dignity, rule of law, certain elements of federalism).

The central principle at stake in this context is democracy, which requires that a sufficient scope of decisions essential for the citizen must be reserved to a democratically elected parliament, the national parliament(s). This concept is, as the Court emphasizes, not only a limitation of European integration established by the German constitution, it is also a basic principle of the

Treaty on European Union (TEU) which recognizes and guarantees the national identity of Member States (Art. 6 (3) TEU
Nice/ Art. 4 (2) TEU Lisbon).

This basic concept has two practical consequences. There is, first, a substantive limitation of the growth of powers of the EU. Even where this limitation is respected, such growth requires the consent of the national parliament.

As to the first requirement, the Court analyses in great detail the scope of those policy fields which remain in the national realm. As the Lisbon Treaty does not add much to the powers of the European Union, this is not so relevant in relation to this particular step of European integration, but the analysis shed some light on the line the Court would draw. Elements which must be reserved to the State are fundamental rules of criminal law, the monopoly of the State to use force in the internal and external sphere, fundamental questions of the State financial system, the shape of the social security system, decisions of fundamental cultural relevance (family law, education, relation between State and religion).

As to the second consequence, the Court asks whether the EP could provide the necessary democratic legitimacy of EU decisions. The Court denies this *inter alia* because that parliament is not "democratically" elected – its composition is a violation of the principle of equal rights for all voters. As to the national parliament, its rights are respected because the powers of the EU are limited to those enumerated in the treaty which has been ratified with parliamentary consent. Thus, this principle of numerated powers or principle of conferral (Art. 5 TEU Lisbon) is a cornerstone of the constitutional acceptability of the EU treaties (TEU and TFEU).

A further safeguard of the impact of national parliaments on EU decisions is the fact that certain areas are still subject to the unanimity requirement as the national parliament can enjoin the government to agree or not to agree to certain EU Council decisions. In this respect, all treaty clauses which allow switching from unanimity to majority decision are problematic. As a consequence, if the German member of the Council is to accept such switch, this requires, under German constitutional law, the consent of the German parliament. In other words, the Court postulates a veto power for the German parliament for any Council decision to be taken unanimously or to any deviation from this requirement. The legislation accompanying the ratification of the Lisbon Treaty was in part unconstitutional because it failed to sufficiently implement this principle by providing for the necessary procedures.

An essential element of the German democratic system is the concept that the German Armed Forces are under strict control of the parliament ("Parlamentsheer"). Thus, any use of the German Armed Forces abroad (except in urgent cases) requires the previous consent of the German Bundestag. This principle has to be maintained even in case of a further military integration in Europe, and it may not be waived though a treaty
amendment.

Thus, serious limitations for the future development of European integration are drawn by the Court, and the Court reserves a right of control over their respect. This means that it could and would declare inapplicable in Germany EU acts which violate them. In reserving this right, in an attempt of appeasement, the Court relies on the ECJ decision in the *Kadi* case where the latter court held that Security Council decisions, although technically binding the EC, were inapplicable because the fundamental rules of EC law prevailed in the internal sphere. Whether the two situations are really comparable is somewhat doubtful, however. This assertion of the last word of the national judiciary is bound to trigger objections. It is no surprise that there are first legal opinions on the market suggesting actual cases where the German Court should use this power.

The clear winner of the case is the German parliament. Its impact is increased beyond the

enhanced recognition of the role of national parliaments which is contained in the Lisbon Treaty (Art. 12 TEU).

Is this type of parliamentary patriotism really a viable, realistic solution to the problem of ensuring the legitimacy of European integration, as it expands, and of decisions taken under this system? There is, however, some positive potential: The enhanced parliamentary powers also entail, the Court emphasizes, more responsibilities. Controversial as the euroskeptical reasoning of the Court may be, this result of increased parliamentary responsibility could be useful and necessary for Europe. If properly used, this responsibility might broaden the public debate about day to day issues of European policy and, thus, give the national voter a feeling that he or she matters in the field European policy. It may thus diminish the alienation between the European institutions and the European peoples which have already resulted in lost referenda.